Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-1862**

GEORGE K. WYMAN, Individually and as Commissioner of Social Services for the State of New York,

*Petitioner,*

—v.—

ALBANY WELFARE RIGHTS ORGANIZATION and CATHERINE BODDIE, Individually and on behalf of her minor children and all other persons similarly situated,

*Respondents,*

and

FRANCIS SCHRECK, Individually and as Commissioner of the Albany County Department of Social Services; GEORGE PIPENTACOS, Individually and as Supervisor in the Albany County Department of Social Services; and JULIE LANCE, Individually and as Social Caseworker in the Albany County Department of Social Services, and ANTHONY JAY, Individually and as Deputy Commissioner in the Albany County Department of Social Services,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF FOR RESPONDENTS IN OPPOSITION

## Opinions Below

The opinion of the United States District Court for the Northern District of New York (Foley, C.J.) dismissing respondents' complaint has not been officially reported. It is reproduced in Appendix A to the Petition at pp. 24-35. The opinion of the Court of Appeals for the Second Circuit reversing the dismissal of respondents' complaint and remanding the case for further proceedings is reported at 493 F.2d 1319 and is reproduced in Appendix B to the Petition at pp. 36-48.

## Jurisdiction

Jurisdiction is adequately set forth in the Petition.

## How the Federal Questions Were Raised

The federal questions were raised by respondents in the complaint in the District Court for the Northern District of New York and on appeal to the Court of Appeals for the Second Circuit.

## Questions Presented

1. Is the promulgation of a policy by the New York State Department of Social Services allowing local welfare commissioners absolute discretion to permit or prohibit the exercise of First Amendment rights inside local welfare centers sufficient state action to give the federal courts jurisdiction over the action as a whole or the State Commissioner under 42 U.S.C. Section 1983?

2. May state officials totally prohibit a welfare rights organization from engaging in the orderly and non-disruptive distribution of welfare rights information to welfare recipients in the public waiting room of a welfare center?

## Statement of the Case

This civil rights action concerns a regulation promulgated by officials of the Department of Social Services (welfare department) of Albany County, New York, and affirmatively permitted by Petitioner, the State Commissioner of Social Services. The regulation prohibits members of the Albany Welfare Rights Organization (AWRO) from entering the public waiting areas of the Albany welfare center to talk to and distribute educational and informational leaflets to welfare recipients concerning their legal rights regarding welfare.

AWRO is a local chapter of the Upstate New York Affiliate of the National Welfare Rights Organization, which has some 150,000 members in approximately 850 local organizations throughout all fifty states (T. 152*). At the time of the hearing in District Court, AWRO had approximately 400 members (T. 153). The organization's purpose is educational and political. It seeks to inform welfare recipients of their legal rights, to train them to help other welfare recipients in their dealings with the welfare department, and to organize them to exert political pressure on behalf of poor people in local, state, and federal government.

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* The letter "T" stands for the transcript of the hearing on respondents' motion for a preliminary injunction held on July 26-27, 1972, in the District Court.

The Albany County Welfare Department is located in a five-story building in the City of Albany, New York. All the work of the department employees that involves personal contact with welfare recipients is carried out on the first and third floors (T. 244), and there are waiting areas on those floors for recipients who come to the center. The welfare department has approximately 400 employees (T. 199).

The work areas of the first and third floors of the welfare department are separated from the corridors and from the public waiting areas by partitions which reach almost to the ceiling. All county business is carried out behind these partitions (T. 205).

Benches are provided in waiting areas for people to sit on, but frequently there is not enough room and people must stand up along the walls and sit on the stairs (T. 66, 95). The waiting people talk together. Children waiting with their mothers run around and play together. Babies cry (and often so do adults) (T. 96).

Every few minutes a welfare department employee comes to the front of the waiting area and shouts out the address of a waiting recipient (rather than the name to preserve anonymity) and that person then enters the work area through a door to see a caseworker (T. 122). Often caseworkers instead come into the waiting area and discuss a client's problem there in public (T. 71, 99).

In short, waiting areas in the welfare department are not quiet sanctuaries. On the contrary, they are noisy, crowded and chaotic and are well-separated from the areas where county business is conducted.

As of May 31, 1972 the welfare department had 6600 cases involving some 20,000 persons. On any given day between 200 and 250 welfare recipients come to the welfare center concerning public assistance alone and excluding those who come for food stamps and medicaid (T. 200). Each of these persons waits an average of an hour and a half before his case is called (T. 72).

At the end of 1969, members of AWRO began to go to the welfare center each week to meet with welfare officials and to distribute leaflets to waiting welfare recipients. This activity was permitted by Albany County welfare officials (T. 123).

The weekly leafleting went on for approximately six months during which time AWRO membership grew by an average of four members a week (T. 78). In mid-1970, however, a new local welfare commissioner changed the old policy and AWRO members were told they could no longer pass out their leaflets inside the welfare center (T. 113). AWRO next attempted to pass out their leaflets and talk to people in the street as they entered and left the welfare center (T. 127). This proved to be unsatisfactory because of the extreme heat, and wind and dirt from nearby construction (T. 132-34, 189); because people entering and leaving the building had other business to attend to, while inside the center they had nothing to do but wait (T. 134); and because welfare recipients often did not want to be identified as such by standing in the public street and discussing their problems with persons identified by buttons as AWRO representatives (T. 190, 193-194).

AWRO also tried to reach welfare recipients in other places. One organizing effort was made in the public housing projects where many welfare recipients live. This

effort, too, proved unsuccessful because, as one witness testified, " . . . People just don't want to open their doors to you any more, for obvious reasons, and they are just not all welfare people that live in the projects. You can't walk up to anyone and say, 'Are you on welfare?' " (T. 161).

During this time AWRO also attempted to place its information on a bulletin board in one of the waiting areas of the welfare center but department officials took it down, declaring that the board was for the use of county employees only (T. 90-91, 179, 192-93).

Welfare recipients are entitled by law to be accompanied by another person of their choosing any time they have dealings with the welfare department. AWRO tried to supply representatives to go individually with welfare recipients to the department, but they rarely had enough trained people available to help all who asked (T. 173).

At the District Court hearing, no evidence was produced to show that during the six months AWRO leafleted in the welfare center any disruption whatsoever was caused by their activities. On the contrary, testimony proved that leafleting was carried on only in public areas of the building which were well-separated from areas where county business was carried out (T. 202); that the public waiting areas were already chaotic; that AWRO did not attempt to force its literature on anyone who did not want it (T. 140, 148, 181, 216); that most people did want it (T. 34-35, 63); that AWRO made every attempt not to litter and to clean up after their visits (T. 111, 168); and that the noise and disruption level was not raised by the presence of AWRO (T. 140, 145-46).

The District Court for the Northern District of New York (Foley, C.J.) denied respondents' motion for a pre-

liminary injunction and dismissed the complaint, holding that two or three persons distributing leaflets inside the welfare center would be disruptive. The Court of Appeals, in an opinion by Judge Gurfein, reversed, holding that welfare officials could not totally prohibit non-disruptive free speech activities in a public waiting-room and remanded the case for a determination of how many persons more than one should be permitted to leaflet in the Albany County welfare center's waiting-room.

## REASONS FOR DENYING CERTIORARI

### I.

### The Question of Jurisdiction Over Petitioner Is Immaterial to the Result in This Case

Respondents confess some confusion as to petitioner's jurisdictional arguments. Petitioner appears to be saying that the courts below had no jurisdiction over this case because no state action was alleged in the complaint. Apparently, petitioner believes that the phrase "state action" means action by an official of one of the states, as opposed to action by an official of a municipality (in this case Albany County welfare officials who were also defendants and appellees in this action in the courts below). Petitioner argues that he, a New York State official, took no action concerning the exercise of First Amendment rights in the Albany County welfare center, and therefore, even though local officials did take such action, there is no "state action."

This argument is clearly incorrect. "State action" within the meaning of 42 U.S.C. Section 1983 refers to action by any public official, municipal as well as state. *Monroe* v. *Pape,* 365 U.S. 167 (1961). Therefore, the federal courts

have jurisdiction in this case over acts of the Albany County welfare officials as well as over petitioner.

Also without merit is petitioner's next argument, that even if the courts below did have jurisdiction over local officials, they had none over him as State Commissioner of Social Services, because he had taken no "action" with respect to the exercise of free speech activities in welfare centers, but simply left total discretion to local officials to permit or prohibit such activities. Petitioner argues that this is insufficient "action" on his part to constitute "state action" within the meaning of 42 U.S.C. §1983.

When the Court of Appeals used the phrase "permissive order," however, it referred precisely to petitioner's policy of permitting local officials to exercise their own discretion. Petitioner is directly in charge of the entire state welfare system. He is responsible by law for the actions of local welfare officials. When he, by affirmative policy, allows local officials to act in an unconstitutional manner while having the power to stop them from doing so, his choice to refrain from exercising his power constitutes state action. *Adickes* v. *Kress and Co.*, 398 U.S. 144 (1969);* *Reitman* v. *Mu'key*, 387 U.S. 369 (1957); *Wright* v. *McMann*, 387 F.2d 519 (2nd Cir. 1967).

In the context of this case, however, this point is purely theoretical, for the ruling of the Court of Appeals is against the county officials who adopted and enforced the challenged regulation, as well as against petitioner. These officials have not petitioned for certiorari, and are acting at present

* Although petitioners cite *Adickes* in their favor, the very quote they use explicitly states that mere "custom or usage" can be the basis for a finding of state action and thus an affirmative policy by a state official clearly constitutes state action. See Petition, pp. 12-13.

in partial compliance with the Court of Appeals' ruling.* A decision by this Court, if certiorari is granted, that the federal courts had no jurisdiction over petitioner would not change the ruling of the Court of Appeals as applied to the county officials who are in immediate control over free speech activities in the Albany County welfare center. Such a decision by this Court would therefore be a nullity as regards this case.

## II.

## The Decision of the Second Circuit Was Clearly Correct

The Second Circuit's unanimous decision that a total prohibition against peaceful, non-disruptive free speech activities by a welfare rights organization inside a welfare center violated the First Amendment is in accordance with well-established law laid down by this Court and by other federal courts.

Peaceful leafleting is a form of communication that is protected by the First Amendment. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971); *Martin* v. *Struthers,* 319 U.S. 141 (1943); *Schneider* v. *State,* 308 U.S. 147 (1939); *Lovell* v. *Griffin,* 303 U.S. 444 (1938).

Therefore, although the state may, of course, promulgate reasonable regulations governing the time, place and manner in which it is carried out, leafleting may not be entirely prohibited in any public place, absent a showing

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* Counsel for respondents have been informed that AWRO has been permitted to set up a table manned by two persons in the welfare center at which information is handed out and questions answered.

that it causes the material and substantial disruption of a function in which the state has a compelling interest, *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969). Mere fear of disruption is not sufficient to justify prohibition of the exercise of free speech activities. *Tinker* v. *Des Moines Independent School District, supra; Unemployed Workers Union* v. *Hackett*, 332 F. Supp. 1372 (D.R.I. 1971).

In upholding the right of persons to engage in free speech activities in a number of places including the public streets (*Thornhill* v. *Alabama*, 310 U.S. 88 (1940)); bus terminals (*Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2nd Cir. (1968), *cert. den.* 393 U.S. 940 (1968)); shopping centers (*Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) as interpreted by the majority in *Lloyd Corp., Inc.* v. *Tanner*, 407 U.S. 551 (1972)); public schools (*Tinker* v. *Des Moines Independent Community School District, supra*); unemployment offices (*Unemployed Workers Union* v. *Hackett, supra*); and Welfare Centers (*Massachusetts Welfare Rights Organization* v. *Ott*, 421 F.2d 525 (1st Cir. 1969)), courts have established several criteria for determining the degree to which free speech activities may be circumscribed in a given place. These criteria include a) the nature of the place—whether "the primary activity for which it is designed is attended with . . . less than perfect order," *Wolin* v. *Port of New York Authority, supra* at 90; b) the nature of the free speech activity—whether, as here, it involves the "pure speech" activity of conversing and distributing leaflets or whether it involves a greater degree of "conduct" such as carrying picket signs and chanting slogans. *Cox* v. *Louisiana, supra;* c) the relationship of the communication to the purpose of the place—whether the place is one "where

the audience appropriate to the content of the communication may be found." *Wolin* v. *Port of New York Authority, supra* at 90; *Unemployed Workers Union* v. *Hackett, supra,* at 1386, or whether the place is the subject of the communication. Compare, *Amalgamated Food Employees Union* v. *Logan Valley Plaza, supra* with *Lloyd Corp.* v. *Tanner, supra.*

Respondents seek to engage only in "pure speech," which is directly connected both with the place and the audience in question. In the words of the Court of Appeals, "[i]t is in the light of [this] modest request [ . . . ] that we must consider whether the waiting room of a welfare office is an appropriate place for the exercise of these constitutional rights." (Appendix B to Petition, p. 45).

The Court of Appeals' conclusion that a welfare office waiting room is an appropriate place for the distribution of welfare rights information is clearly correct.

Applying the criteria outlined above, five federal courts prior to the Second Circuit issued opinions (two of which have been affirmed by this Court*) finding welfare and un-

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* Petitioner argues that the affirmance by this Court of *LeClair* v. *O'Neil*, 307 F. Supp. 621 (D. Mass. 1969), and *Hurley* v. *Hinckley*, 304 F. Supp. 704 (D. Mass. 1969), was based solely on the grounds that "Federal courts should abstain from interfering with the enforcement of state law" (Petition, p. 15). Petitioner draws this conclusion from the fact that in its summary affirmance of *LeClair* (a case in which the federal court refused to enjoin prosecutions under a state trespass statute against persons who had set up an information table in a welfare center where the table itself had obstructed the flow of traffic) this Court cited *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Samuels* v. *Mackell* and *Fernandez* v. *Mackell*, 401 U.S. 66 (1971). Petitioner assumes that this same reasoning must have been the basis of this Court's affirmance in *Hurley* v. *Hinckley, supra.* This assumption is false. This Court's holding in *Younger* v. *Harris, supra* was not that federal courts

employment office waiting rooms to be appropriate places for the exercise of relevant and non-disruptive First Amendment activities. *Hurley* v. *Hinckley,* 304 F. Supp. 704, 712 (D. Mass. 1969), *aff'd summarily sub nom., Doyle* v. *O'Brien, Chief of Police of Somerville,* 396 U.S. 277 (1970); *LeClair* v. *O'Neil,* 307 F. Supp. 621 (D. Mass. 1969), *summarily aff'd* 401 U.S. 984 (1971); *Massachusetts Welfare Rights Organization* v. *Ott, supra; Unemployed Workers Union* v. *Hackett, supra; Indiana Consumers and Workers et al.* v. *Swaim,* Civ. No. 72F5 (D.C. Ind. July 12, 1972) (unreported; the decision is annexed hereto in the appendix).

Petitioners argue that welfare recipients have the right to be protected from the invasion of their privacy by persons seeking to inform them of their legal rights. The Court of Appeals, however, "[did] not consider the right of privacy of the welfare recipients as a compelling consideration against First Amendment rights." (Appendix B to Petition p. 47). This reasoning, too, is clearly correct, and in accordance with applicable decisions of this Court.

The record in the court below clearly shows that there is no privacy whatsoever in the welfare center, even without leafleting. Not only is it obvious by a person's presence in the center that he or she is on welfare or is seeking assistance, but frequently case workers discuss recipients'

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should "abstain from interfering with the enforcement of state law," but that they should not enjoin pending state criminal prosecutions. In one of the companion cases making up *Hurley* v. *Hinckley, supra,* however, there was no pending state prosecution, but only threat of one should the plaintiff continue to distribute leaflets in the welfare center, and thus this Court's affirmance can only be of the holding of the Massachusetts District Court that the Massachusetts trespass statute was not aimed at preventing the peaceful distribution of leaflets in a welfare center waiting room and its dictum that the First Amendment guarantees of speech and petition protect these activities.

cases with them in the public waiting room (T. 71, 99). Indeed, it is largely concern for recipients' privacy that makes AWRO members prefer to carry on their activities inside the center rather than in the street.

The law is well-established that a person's right to privacy is greatly diminished when he ventures out of his own house and into a public or quasi-public arena. In the words of this Court in *Public Utilities Comm.* v. *Pollack*, 343 U.S. 451, 469 (1951) (holding that non-commercial broadcasting on public buses did not invade passengers' constitutional rights).

> "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance."

*Organization for a Better Austin* v. *Keefe, supra*, further supports the proposition that when the right to distribute leaflets comes into conflict with a right of privacy, a blanket prohibition against leafleting is not justified.

The recent decision of this Court in *Lehman* v. *City of Shaker Heights*, —— U.S. ——, 42 U.S.L.W. 5116 (June 25, 1974) is not to the contrary. There, in a closely divided decision, in which there was no majority opinion, four justices recognized that many factors go into the decision whether a particular forum is an appropriate one for free speech activities. In particular, the Court considered the nature of the forum. It distinguished the public buses, on which plaintiffs sought to affix placards, from other areas more traditionally associated with the exercise of First Amendment rights on the grounds that on the buses there were "no open spaces, no meeting hall, park, street

corner or other public thoroughfare," 42 U.S.L.W. at 5117. The public waiting room of the Albany County welfare center, however, does have open space and is far more similar to a meeting hall and a public thoroughfare than is a bus. Thus, it falls into the category of those public places in which free speech activities must be permitted.*

The *Lehman* case can be distinguished from the case at bar still further, First, in *Lehman,* the communications which were sought to be placed in public vehicles were not specifically related to either the place or the audience, and because the means of communication were signs affixed to the walls of the bus, which were impossible to "turn off", whereas here they are leaflets which can easily be ignored.

The Second Circuit specifically stated that its holding would not permit a welfare recipient to be "badgered to the point of being made a captive." No allegations have been made, however, that such badgering has ever taken place. Welfare recipients have only to shake their heads to be rid of the proffered communication. Considerable testimony at the hearing below proved that plaintiffs' non-aggressive, non-coercive offering of printed and verbal information and advice did not constitute an intolerable invasion of privacy. Absent coercion it is clear that expression may not be stifled because it may be offensive to the audience. *Terminiello* v. *City of Chicago,* 337 U.S. 1 (1948); *Cox* v. *Louisiana, supra; Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971).

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* If the critical question is whether the facility has the attributes of a "meeting place for discussion", see *Lehman, supra,* 42 U.S.L.W. 5118 (concurring opinion of Mr. Justice Douglas), it is clear that a public waiting room in a welfare center, where people meet each other and converse on welfare problems while they are waiting to be served, is much more a "meeting place for discussion" facility, than is a public conveyance.

In fact, the evidence is most persuasive that the majority of persons waiting in the welfare center wished to receive the proffered information and that petitioner wished to prevent them from doing so. But in any case, those who did not want the information had only to refuse it. The First Amendment protects the right to receive as well as to disseminate information. See *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965). The fact that some people might not want a leaflet is not a Constitutional reason for prohibiting others from having access to it.

## CONCLUSION

Petitioner's application for a writ of certiorari should be denied.

Respectfully submitted,

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